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**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,  
APPELLANTS

v.

STATE OF MONTANA, ET AL.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA

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**BRIEF FOR APPELLANTS**  
**UNITED STATES DEPARTMENT OF COMMERCE,**  
**ET AL.**

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## QUESTIONS PRESENTED

Article I, Section 2, Clause 3 of the United States Constitution provides that Representatives in the United States House of Representatives "shall be apportioned among the several States which may be included within this Union, according to their respective Numbers." Section 2 of the Fourteenth Amendment reiterates that requirement. The questions presented by this case are:

1. Whether Congress's choice among alternative means of apportioning Representatives that are rationally tied to the respective populations of the States is subject to review by a court.

2. Whether 2 U.S.C. 2a, which provides for apportionment of Representatives on the basis of the mathematical formula known as the "method of equal proportions," satisfies the requirement that Representatives be apportioned among the States "according to their respective Numbers."

## II

### PARTIES TO THE PROCEEDINGS

The appellants herein, who were defendants in the district court, are the United States Department of Commerce; the Acting Secretary of Commerce (substituted as a party pursuant to Rule 35.3 of the Rules of this Court); the Bureau of the Census; and Barbara Everitt Bryant, Director of the Bureau of the Census. Donnal K. Anderson, Clerk of the United States House of Representatives, also was a defendant in the district court and has filed a separate notice of appeal to this Court.

The appellees in this Court, who were the plaintiffs below, are the State of Montana; Stan Stephens, Governor of Montana; Marc Racicot, Attorney General of Montana; Mike Cooney, Secretary of State of Montana; Max Baucus and Conrad Burns, United States Senators from Montana; and Pat Williams and Ron Marlenee, United States Representatives from Montana.

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v.

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**BRIEF FOR APPELLANTS**  
**UNITED STATES DEPARTMENT OF COMMERCE,**  
**ET AL.**

**OPINIONS BELOW**

The opinion of the three-judge district court (J.S. App. 1a-34a) is reported at 775 F. Supp. 1358. The order of the single judge (J.S. App. 35a-46a) is not reported.

**JURISDICTION**

The judgment of the three-judge district court (J.S. App. 47a-48a) was entered on October 18, 1991. The notice of direct appeal (J.S. App. 49a-51a) was filed on October 24, 1991, and the appeal was docketed on November 26, 1991. The Court noted probable jurisdiction on December 16, 1991. J.A. 34. The jurisdiction of this Court is invoked under 28 U.S.C. 1253. See J.S. 25-28.

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Article I, Section 2, Clauses 1 through 3, and Section 8, Clause 18 of the United States Constitution; Sections



2 and 5 of the Fourteenth Amendment to the Constitution; 2 U.S.C. 2a; and 13 U.S.C. 141(a) and (b), are reproduced at App., *infra*, 1a-5a.

### STATEMENT

The district court in this case held unconstitutional the Act of Congress that prescribes the method for apportioning Representatives among the States. 2 U.S.C. 2a(a). That statute was enacted in 1941 to resolve a 150-year-old controversy about the most appropriate formula for apportioning Representatives, and it has governed apportionment of the House of Representatives ever since. The Act mandates that Representatives be apportioned by what is known as the "method of equal proportions," which utilizes a formula based on geometric means—a familiar approach in statistical analysis. That method, and the four alternatives considered at the time (including the "Adams method" and "Dean method" advocated by appellees), are described at pages 11-13, *infra*. Compared to each of these alternatives, the method of equal proportions minimizes the relative difference in a pairwise comparison between any two States with respect to both (1) the number of persons represented by a Representative (*i.e.*, the average population of congressional districts), and (2) each person's "share" of a Representative (*i.e.*, the number of a State's Representatives divided by its population).

#### A. Constitutional, Statutory, And Historical Background

1. Article I, Section 2 of the Constitution provides that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers"; "but each State shall have at Least one Representative," and the "Number of Representatives shall not exceed one for every thirty Thousand" persons. Art. I, § 2, Cl. 3. The "actual Enumeration" of persons in the States must be made every ten years, "in such Manner as they [the Congress] shall by Law direct." *Ibid.* Section 2 of the Fourteenth Amendment reiterates that "Representatives shall

be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State."<sup>1</sup> The Constitution does not expressly specify that it is Congress that shall make the apportionment, but Congress has provided by law for the apportionment since 1792. See *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842); Art. I, § 8, Cl. 18 (Necessary and Proper Clause); Amend. XIV, § 5 (Congress has power to enforce Fourteenth Amendment); pages 5-14, *infra*. Similarly, because the Constitution does not prescribe the number of Representatives (aside from setting a minimum of one Representative for every State and a maximum of one Representative for every 30,000 persons), that responsibility likewise has fallen to Congress. The total number was increased steadily from the 65 initially provided for in the Constitution itself (Art. I, § 2, Cl. 3) to the current total of 435, which was adopted in 1911. See note 11, *infra*.

Pursuant to the Census Clause in Article I, Section 2 of the Constitution, Congress enacted the current Census Act, which directs the Secretary of Commerce to conduct a census, as of April 1 of 1980 and every tenth year thereafter, "in such form and content as he may determine." 13 U.S.C. 141(a). The tabulations required for apportionment "shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." 13 U.S.C. 141(b). Under the current apportionment law, the President, in turn, must

<sup>1</sup> Article I, Section 2, Clause 3 provides that the number of persons "shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other persons." This provision was amended by the first sentence of Section 2 of the Fourteenth Amendment, which omitted the three-fifths rule for "all other persons," *Baldrige v. Shapiro*, 455 U.S. 345, 348 n.1 (1982), but retained the exclusion of "Indians not taxed." The second sentence of Section 2 provides for reduction of representation for a State if it denies or abridges the right of male citizens over 21 years of age to vote. See *Richardson v. Ramirez*, 418 U.S. 24, 42-55 (1974).



transmit to Congress, during the first week of its next Session, "a statement showing the whole number of persons in each State," as ascertained by the census. 2 U.S.C. 2a(a). The President's statement must also show "the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member." *Ibid.* The apportionment law further provides that "[e]ach State shall be entitled \* \* \* to the number of Representatives shown in the [President's] statement required by [2 U.S.C. 2a(a)]," and it directs the Clerk of the House of Representatives, within 15 days after receipt of the President's statement, to "send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section." 2 U.S.C. 2a(b).

2. Congress adopted the "method of equal proportions" as part of the current apportionment law in 1941. That decision resolved a political controversy, as old as the Constitution itself, regarding the appropriate means of implementing the general constitutional mandate that Representatives shall be apportioned among the States according to their respective populations. The problem arises from the fact that an apportionment of any given number of Representatives would almost invariably result in a whole number of Representatives for each State, plus a fractional remainder. For example, using the total of 435 Representatives established by current law and the population totals from the 1990 census, the exact quotas for the States range from a high of 52.124 Representatives for California to a low of 0.797 Representatives for Wyoming.<sup>2</sup> The Constitution, however, renders any such precise

<sup>2</sup> Exh. B to Decl. of Lawrence R. Ernst, Assistant Chief, Statistical Research Division, Bureau of the Census, submitted in support of appellants' motion for summary judgment (2 J.A. 76-77). The exact quota (*i.e.*, the unrounded number of Representatives for each State) is calculated by dividing the total population of all the States by 435—which will yield the nationwide average of

apportionment impossible, by virtue of its explicit requirement that each State have at least one Representative, and the implicit assumption that each State must be allotted a whole number of Representatives. J.S. App. 9a, 15a n.4; *id.* at 23a, 24a-25a (O'Scannlain, J., dissenting). Congress therefore must devise some way of addressing the phenomenon of fractional remainders when it apportions Representatives.

a. In the decades following adoption of the Constitution, Congress enacted a new apportionment act after each decennial census. In those acts, Congress allocated Representatives by selecting a uniform (albeit arbitrary) number of persons to be represented by each Representative (the "ratio"), and then dividing that figure into each State's population.<sup>3</sup> Up through the 1832 apportionment, fractional remainders were disregarded. L. Schmeckebier, *Congressional Apportionment* 109, 112-113 (1941) [*Congressional Apportionment*]; cf. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 320 (1820). This method of disregarding fractions is known as the "Jefferson method" (because it was endorsed by Thomas Jefferson during the controversy surrounding the first apportionment in 1792 (see pages 35-37, *infra*)), or the "method of greatest divisors." See generally *Congressional Apportionment* at 73, 107-114; M. Balinski & H.P. Young, *Fair Representation* 12 (table 3.3), 18, 21, 23, 25 (1982) [*Fair Representation*]; Chafee, *Congressional Reapportionment*, 42 Harv. L. Rev. 1015, 1021, 1022 (1929); page 12, *infra*.<sup>4</sup>

persons per Representative (nationwide average district size)—and then dividing that result into the population of each State.

<sup>3</sup> Act of Apr. 14, 1792, 1 Stat. 253 (one Representative per 33,000 persons); Act of Jan. 14, 1802, 2 Stat. 128 (33,000); Act of Dec. 21, 1811, 2 Stat. 669 (35,000); Act of Mar. 7, 1822, 3 Stat. 651 (40,000); Act of May 22, 1832, 4 Stat. 516 (47,700). These Acts all specified the number of Representatives each State was to receive under the apportionment, without actually specifying the method of apportionment.

<sup>4</sup> In 1832, John Quincy Adams, by then a Member of the House, proposed another method (the "Adams method" or the "method of smallest divisors"), which appellees advocated below. See J.S. App.

In 1842, Congress again apportioned Representatives based on a specified ratio of the number of persons (70,680) per Representative; but for the first time it also took account of some fractional remainders by allocating "one additional representative for each State having a fraction greater than one moiety [one half] of the said ratio." Act of June 25, 1842, § 1, 5 Stat. 491. This method is known as the "Webster method" (because it was endorsed by Senator Daniel Webster),<sup>5</sup> or the "method of major fractions." *Congressional Apportionment* at 112-113; *Fair Representation* at 28-35; Chafee, 42 Harv. L. Rev. at 1022-1023.

b. These early apportionment acts (like later ones) generated extended debates about the most appropriate way of apportioning Representatives. The debates were often characterized by disputes between large and small States, between North and South, between political factions—and, of course, between States that stood to gain and those that stood to lose under alternative methods of apportionment, in light of the most recent decennial census. See generally *Fair Representation* at 11, 13, 15-16, 20, 21-22, 25, 35.<sup>6</sup>

15a n.5. Under the Adams method, the population of every State would be divided by a prescribed ratio of persons per Representative, just as under the Jefferson method; but every State then would receive an additional Representative for its fractional remainder (no matter how small). This method, which favored New England States in 1832, was the mirror image of the Jefferson method, which disregarded all fractional remainders (no matter how large) and favored southern States in that year. *Fair Representation* at 27-29.

<sup>5</sup> Webster advocated a variant of this method in 1832. See 8 Cong. Deb. 487-490 (1832); Report of Senate Select Comm., S. Doc. No. 119, 22d Cong., 1st Sess. (1832), reprinted in 8 Cong. Deb. App. 92-111 (1832). Although the proposal received support in the Senate at that time (but not overwhelming support, see, e.g., 8 Cong. Deb. 640 (1832) (Sen. Clay); *id.* at 936 (Sen. Forsyth); *id.* at 641 (Sen. Poindexter)), the House was firmly opposed to it. See *id.* at 934-936.

<sup>6</sup> See, e.g., 3 Annals of Cong. 200-202 (1791); *id.* at 244 (Rep. White); *ibid.* (Rep. Williamson); *ibid.* (Rep. Boudinot); *id.* at

In response to this experience, Congress, in the Census Act of 1850, adopted a much different approach. Act of May 23, 1850, §§ 24-26, 9 Stat. 428, 432-433. First, the 1850 Act fixed the size of the House at 233 Members. § 24, 9 Stat. 432. Second, it provided that those Representatives would be apportioned after the next and all succeeding censuses according to a new method, commonly known as "Vinton's method,"<sup>7</sup> and directed the Secretary of the Interior to ascertain and certify to the House of Representatives the apportionment of Representatives under the statutorily prescribed method. §§ 25, 26, 9 Stat. 432-433. Under the Vinton method, the aggregate population of all the States was divided by 233 to determine the ratio of persons per Representative; that ratio was then divided into the population of each State; the resulting quotient (disregarding fractions in the first instance) was the number of Representatives apportioned to that State; and the remaining Representatives necessary to bring the nationwide total to 233 were distributed among the States having the highest fractional remainders. § 23, 9 Stat. 432-433. The 1852 apportionment was carried out pursuant to the 1850 Act, based on the certification by the Secretary of the Interior. H.R. Exec. Doc. No. 129, 32d Cong., 1st Sess. (1852); see *Congressional Apportionment* at 115.

Although it was hoped that the 1850 Act would furnish a permanent and self-executing resolution of the recurring

245 (Rep. Goodhue); *ibid.* (Rep. Hillhouse); *id.* at 246 (Rep. Giles); *ibid.* (Rep. Williamson); *id.* at 248-250 (Rep. Sedgwick); *id.* at 254-259 (Rep. Ames); *id.* at 274 (Rep. Laurence); *id.* at 335 (Rep. Livermore); 11 Annals of Cong. 338 (1801) (Reps. Giles, Jones); *id.* at 339-340 (Rep. Bacon); 8 Cong. Deb. 934 (1832) (Sen. Dickerson); 11 Cong. Globe, 27th Cong., 2d Sess. 627 (1842) (Rep. McClellan).

<sup>7</sup> The method is named after Representative Vinton of Ohio. 21 Cong. Globe, 31st Cong., 1st Sess. 863 (1850). The apportionment bill initially passed by Congress in 1792 was based on essentially the same method and was endorsed by Alexander Hamilton. *Fair Representation* at 15-17; see pages 35-37, *infra*. For this reason, it is sometimes known as the "Hamilton/Vinton" method.



and contentious apportionment debate, Congress soon departed from that approach. In 1862, after the Secretary certified the apportionment pursuant to the 1850 Act (H.R. Exec. Doc. No. 2, 37th Cong., 1st Sess. (1861)), Congress enacted a special law that assigned an additional Representative to each of eight States. Act of Mar. 4, 1862, § 1, 12 Stat. 353. After each succeeding decennial census, Congress enacted a new apportionment law that increased the size of the House (in order to prevent any State from losing a Representative), and returned to the prior practice of prescribing the apportionment in the law itself. Although the text of the laws from 1862 through 1901 did not identify the method on which the respective apportionments were based, the Vinton method was employed in those years. *Congressional Apportionment* at 113-119; Chafee, 42 Harv. L. Rev. at 1025-1027 & nn.28-34; Celler, *Congressional Apportionment—Past, Present, and Future*, 17 Law & Contemp. Probs. 268, 270-271 (1953).<sup>8</sup> Nonetheless, Congress soon became disenchanted with that method, especially after it gave rise in 1881 to what has become known as the “Alabama paradox”—a mathematical quirk that can result in a State’s actually receiving *fewer* Representatives for a given population if the nationwide total number of Representatives is *increased*.<sup>9</sup> To avoid that result, Congress set the increase in the size of the House at a particular level at which,

<sup>8</sup> In 1872, Congress increased the size of the House to 283 (Act of Feb. 2, 1872, § 1, 17 Stat. 28), and then, four months later, assigned an additional Representative to each of nine States (Act of May 30, 1872, 17 Stat. 192). The additional seats were assigned to the States having the highest fractional remainders. See H.R. Rep. No. 28, 42d Cong., 2d Sess. (1872). For the succeeding decades, see: Act of Feb. 25, 1882, § 1, 22 Stat. 5 (325 Representatives); Act of Feb. 7, 1891, § 1, 26 Stat. 735 (356 Representatives); Act of Jan. 16, 1901, § 1, 31 Stat. 733 (386 Representatives).

<sup>9</sup> *Fair Representation* at 38-40; *Congressional Apportionment* at 5-7; Chafee, 42 Harv. L. Rev. at 1025-1027. See, e.g., 13 Cong. Rec. 967 (1882) (Rep. Prescott); 22 Cong. Rec. 1899-1900 (1891) (Sen. Hale); S. Doc. No. 304, 76th Cong., 3d Sess. 28-29 (1940).

even under the Vinton method, the paradox would not arise.<sup>10</sup>

In 1911, Congress once again increased the size of the House to avoid a loss to any State, fixing the number of Representatives at the current total of 435. Act of Aug. 8, 1911, § 1, 37 Stat. 13.<sup>11</sup> Although, as usual, the statutory text did not identify what method was used, the legislative history shows that this time, it was the major fractions (Webster) method. S. Rep. No. 94, 62d Cong., 1st Sess. 2-3 (1911); H.R. Rep. No. 12, 62d Cong., 1st Sess. 2-3 (1911); see *Congressional Apportionment* at 119-120; *Fair Representation* at 47; Chafee, 42 Harv. L. Rev. at 1035.

c. Following the 1920 census, Congress failed for the first time to pass *any* apportionment law, because of concerns about the accuracy of the census, dramatic population shifts from rural to urban areas, and dissatisfaction with the major fractions (Webster) method. During that period, considerable interest developed in the equal proportions (Hill) method, which had first been proposed in 1911 by Joseph Hill, a statistician with the Census

<sup>10</sup> *Fair Representation* at 38-42; Chafee, 42 Harv. L. Rev. at 1027 n.34; but see *id.* at 1026 n.31. In addition, *Fair Representation* states (at 37, 40, 42) that from 1862 to 1901, the total number of Representatives often was set at a level at which the Vinton method would yield the same apportionment that would have resulted if the Webster method had been used. 34 Cong. Rec. 743 (1901), adopting bill explained in H.R. Rep. No. 2130, 56th Cong., 2d Sess. 115-146 (1900) (minority views); 22 Cong. Rec. 531 (1890) (Rep. Dunnell); *id.* at 1858 (Sen. Davis); but cf. 13 Cong. Rec. 1180-1181 (1882).

<sup>11</sup> The 1911 Act fixed the total number of Representatives at 433, but provided that additional Representatives would be allocated to Arizona and New Mexico if (as happened the next year) they were admitted to the Union. § 2, 37 Stat. 14. The number of Representatives was temporarily increased to 437 following the admission of Alaska and Hawaii in 1959, but it reverted to 435 following the 1960 census. See Alaska Statehood Act, § 9, 72 Stat. 345; Hawaii Statehood Act, § 8, 73 Stat. 8.

Bureau. See S. Rep. No. 94, *supra*, at 43-57; H.R. Rep. No. 12, *supra*, at 43-57. The equal proportions method was unanimously endorsed in 1921 by the advisory committee to the Director of the Census Bureau in a study conducted at the request of the Chairman of the Senate Committee on the Census, and in a paper by Edward Huntington, a professor of mathematics from Harvard who also worked with the Census Bureau.<sup>12</sup> These experts contended, *inter alia*, that the major fractions method was biased in favor of large States. Numerous bills were introduced and hearings held at the beginning and toward the end of the 1920s,<sup>13</sup> but Congress could not agree on any solution. In an effort to break the impasse before the 1930 census and to avoid future deadlocks, the Speaker of the House requested the National Academy of Sciences (NAS) to review various methods of apportionment. The NAS appointed a committee of four prominent mathematicians for that purpose. See generally *Fair Representation* at 47-55; *Congressional Apportionment* at 120-122; Chafee, 42 Harv. L. Rev. at 1015-1016 & n.2, 1032; Celler, 17 Law & Contemp. Probs. at 271; Ernst Decl. ¶¶ 8, 10 (2 J.A. 22).

The NAS committee submitted its report on February 5, 1929. G.A. Bliss, *et al.*, *Report to the President of the*

<sup>12</sup> These documents are reproduced in *Hearings on H.R. 15471 Before the House Comm. on the Census*, 69th Cong., 2d Sess. 53, 94 (1927) [1927 House Hearings]. See also 67 Cong. Rec. 7078-7080 (1926) (advisory committee report).

<sup>13</sup> See H.R. Rep. No. 1173, 66th Cong., 3d Sess. (1921); H.R. Rep. No. 312, 67th Cong., 1st Sess. (1921); H.R. Rep. No. 1137, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 2010, 70th Cong., 2d Sess. (1929); S. Rep. No. 1446, 70th Cong., 2d Sess. (1929); S. Rep. No. 2, 71st Cong., 1st Sess. (1929); *Apportionment of Representatives: Hearings on H.R. 14498, 15021, 15158 and 15217 Before the House Comm. on the Census*, 66th Cong., 3d Sess. (1920-1921); *Apportionment of Representatives: Hearing Before a Subcomm. of the House Comm. on the Census*, 67th Cong., 1st Sess. (1921); 1927 House Hearings, *supra*; *Hearing on H.R. 130 Before the House Comm. on the Census*, 70th Cong., 1st Sess. (1928).

*National Academy of Sciences* (1929) (1 J.A. 15-19) (reproduced at 70 Cong. Rec. 4966-4967 (1929), and H.R. Rep. No. 1314, 91st Cong., 2d Sess. 19-21 (1970)). The committee considered five methods of apportionment: (1) equal proportions (Hill), (2) harmonic means (also known as the Dean method), (3) major fractions (Webster), (4) smallest divisors (Adams) (see note 4, *supra*), and (5) greatest divisors (Jefferson).<sup>14</sup> Although these methods may be described in various ways as a practical matter, they may also be expressed mathematically in a form that permits comparison: Each State is first allotted one Representative, as required by the Constitution. A series of priority values is then calculated for each State, from which its entitlement to a second and subsequent Representatives can be determined. The priority values for all States are then arranged in sequence from highest to lowest, to indicate which State should receive the 51st Representative, which State the 52d, and so on through the 435th Representative. Under all of the methods, the formula for establishing each State's priorities has as its numerator the population of the State. The methods differ only with respect to the denominator.

For example, under the method of equal proportions, the priority values for each State are calculated by dividing its population (SP) by the *geometric* mean of the number of Representatives the State has already received in the sequential allocation ("n") and the next integer ("n+1"). The resulting formula is:

$$\frac{SP}{\sqrt{n(n+1)}}$$

Under the major fractions (Webster) method, a State's priority values are calculated by dividing its population by the *arithmetic* mean between successive Representatives in the allocation, as depicted by the formula:

<sup>14</sup> The NAS committee did not consider the Vinton method, because it had been discredited by its propensity to create the "Alabama paradox." J.A. 17; *Fair Representation* at 55.



$$\frac{SP}{n+1/2}$$

Under the harmonic means (Dean) method, urged by appellees below, the State's population is divided by the *harmonic* mean between successive Representatives in the allocation, as depicted by the formula:

$$\frac{2n(n+1)}{n+(n+1)}$$

$$\frac{SP}{n}$$

The smallest divisors (Adams) method, also urged by appellees below, was designed in theory to round up all fractional remainders, and is depicted by the formula:

$$\frac{SP}{n+1}$$

The greatest divisors (Jefferson) method, by contrast, was designed in theory to round down all fractional remainders, and is depicted by the formula:

$$\frac{SP}{n+1}$$

See generally *Congressional Apportionment* at 8-9, 14, 22-23, 33-34, 41, 50; Chafee, 42 Harv. L. Rev. at 1029 nn.3-9; 2 J.A. 9.

In evaluating these five methods, the NAS committee utilized four measures of equity (1 J.A. 18-19):

1) *Persons per Representative* (average district size)—the State's population divided by its number of Representatives.

2) *Each person's share of a Representative*—the number of a State's Representatives divided by its population.

3) *Representation surplus*—the difference between (i) the number of Representatives of an over-represented State, and (ii) the number of Representatives of an under-represented State multiplied by the population of the over-represented State divided by the population of the under-represented State.

4) *Representation deficiency*—the difference between (i) the number of Representatives of an under-

represented State, and (ii) the number of Representatives of an over-represented State multiplied by the population of the under-represented State divided by the population of the over-represented State.

See also Ernst Decl. ¶ 11 (1 J.A. 23).

The NAS committee concluded that four of the apportionment methods it considered each best achieved one of these measures of equity, in absolute terms, in a pairwise comparison between any two States.<sup>15</sup> Thus, the major fractions (Webster) method minimizes the absolute difference between each person's share of a Representative; the harmonic means (Dean) method minimizes the absolute difference between the number of persons per Representative; the smallest divisors (Adams) method minimizes the absolute representation surplus; and the greatest divisors (Jefferson) method minimizes the absolute representation deficiency. By the same token, the NAS committee concluded that the equal proportions method minimizes the *relative* (percentage) variation of both the number of persons per Representative *and* each person's share of a Representative. See note 37, *infra*. For this reason, and because "it occupies mathematically a neutral position with respect to emphasis on larger and smaller states," the NAS committee recommended adoption of the method of equal proportions. 1 J.A. 18-19; see also Ernst Decl. ¶¶ 13-14 (1 J.A. 24-25); pages 41-42, 46-47, *infra*.

Following receipt of the NAS Report, Congress enacted permanent apportionment legislation as part of the Census Act of 1929, although it did not then definitively choose a particular apportionment formula. Act of June 18, 1929, § 22, 46 Stat. 26-27. Instead, the 1929 Act

<sup>15</sup> Pairwise comparisons are "a commonly used approach that consists of examining the effects of moving a seat between any pair of States. An apportionment method is optimal under the pairwise criterion with respect to a particular measure of inequity if a transfer of representatives between any pair of states increases the amount of inequity between these states." Ernst Decl. ¶ 12 (1 J.A. 23-24). See also NAS Report (1 J.A. 18).

directed the President, following every decennial census, to report to Congress the number of Representatives to which each State would be entitled under the equal proportions method, the major fractions method, and the method used in the preceding apportionment; if Congress did not enact an apportionment law before the end of the Session, each State would be entitled to the number of Representatives to which it was entitled under the method used in the prior apportionment. *Ibid.* When Congress did not enact an apportionment law following the 1930 census, Representatives were apportioned according to the method of major fractions (the method used in the prior apportionment, in 1911), although the method of equal proportions would have resulted in the same apportionment. *Congressional Apportionment* at 124; *Fair Representation* at 57. Finally, in 1941, after studying the matter once again, Congress determined that equal proportions was the most appropriate method of apportionment (see pages 40-42, *infra*); it accordingly amended the 1929 Act to provide that Representatives are to be automatically apportioned under the method of equal proportions, in the manner now prescribed by 2 U.S.C. 2a. Act of Nov. 15, 1941, § 2(a), 55 Stat. 762. The method of equal proportions has been the basis for all reapportionments ever since. *Fair Representation* at 58.

d. Although Congress has not changed the apportionment formula since 1941, it has reviewed the issue on several occasions. Most notably, in 1948, the NAS was asked to reexamine the various apportionment methods. The requested study was undertaken by "[t]hree of the most distinguished mathematicians of the day." *Fair Representation* at 78; see M. Morse, *et al.*, *Report to the President of the National Academy of Sciences* (1948) (reproduced at App., *infra*, 6a-12a). The 1948 report not only confirmed the 1929 NAS Report's conclusions that the equal proportions method "stands in a middle position" with respect to small and large States (App., *infra*, 11a, 8a) and minimizes the *relative* difference between persons per Representative (average district size) and Representatives per person (share in a Representative)

in pairwise comparisons between States; it also found that equal proportions is superior to each of the four alternative methods with respect to the *absolute* difference in one or the other of those measures. *Id.* at 9a. Accordingly, the 1948 report concluded that the equal proportions method has a "decisive" advantage over the others. *Id.* at 11a; see also *id.* at 9a. See pages 42, 46-47, *infra*.<sup>10</sup>

### B. The Proceedings In This Case

1. Following the 1990 census, the President, on January 3, 1991, transmitted to Congress the statement required by 2 U.S.C. 2a(a). 27 Weekly Comp. Pres. Doc. 6 (1991). Based on the 1990 census, Montana's percentage of the national population translated into 1.404 Representatives out of the fixed total of 435. Under the method of equal proportions, Montana was entitled to one Representative, a loss of one. 2 J.A. 78.

On May 22, 1991, appellees (the State of Montana and its Governor, Attorney General, Secretary of State, Senators, and Representatives) commenced this suit for declaratory and injunctive relief against the Department and Secretary of Commerce, the Bureau of the Census and its Director, and the Clerk of the House of Representatives. Appellees alleged that use of the equal proportions method to apportion Representatives contravenes Article I, Section 2 of the Constitution, and they suggested that adoption of the harmonic means (Dean) method or the smallest divisors (Adams) method—neither of which had ever been used before—would be preferable. Under the Dean method, Montana would receive two Representatives rather than one, while Wash-

<sup>10</sup> In 1970, the responsible House Committee reported that the equal proportions method best implements the Constitution, noting that it was adopted in 1941 "after a century and a half of experimentation, studies, and constitutional debates." H.R. Rep. No. 1314, 91st Cong., 2d Sess. 5-6 (1970). In 1981, the House considered a bill that would have reinstituted the Vinton method. *Census Activities and the Decennial Census: Hearing on H.R. 1990 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 97th Cong., 1st Sess. (1981).



ington would receive eight rather than nine; no other State's allocation would be affected. The Adams method, however, would alter the allocations to 18 States. Ernst Decl., Exh. B (2 J.A. 76-77).

2. On October 18, 1991, a divided three-judge district court declared 2 U.S.C. 2a "unconstitutional and void" and permanently enjoined the defendants "and their agents \* \* \* from effecting reapportionment of the United States House of Representatives under [2 U.S.C. 2a]." J.S. App. 47a-48a; *id.* at 1a-34a.<sup>17</sup>

a. The court recognized that "[n]o state has heretofore turned to the judicial branch to challenge the method employed by Congress to apportion representatives among the several states." J.S. App. 9a. It also recognized that strict application of the "one person, one vote" principle is a "mathematical impossibility" in this setting, "because Congress must adhere to existing state boundaries and each state must have at least one representative." *Ibid.* But the court concluded that the one person/one vote principle nevertheless should govern to the extent practicable, and that the reasoning of *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Karcher v. Daggett*, 462 U.S. 725 (1983)—which concerned a state legislature's drawing of congressional districts within a State—should also apply to Congress's apportionment of Representatives among the States. J.S. App. 9a-12a. In the lower court's view, if the party challenging such an apportionment "establishes 'that the population differences were not the result of a good-faith effort to achieve equality,' the burden then shifts to the defendant to prove 'that each significant variance between districts was nec-

<sup>17</sup> As an initial matter, the three-judge court held that it was properly convened under 28 U.S.C. 2284, and it rejected appellants' contentions that the case presents a nonjusticiable political question and that appellees lack standing. J.S. App. 4a-5a. Judge O'Scannlain agreed with the majority on these threshold issues. *Id.* at 20a. Judge Lovell previously had denied appellants' motion to dismiss on standing and political question grounds. *Id.* at 37a-46a.

essary to achieve some legitimate goal.'" *Id.* at 13a (quoting *Karcher*, 462 U.S. at 730-731).

Applying those principles here, the court agreed with appellees that Congress must adopt the apportionment method that minimizes the "absolute difference between numbers of persons per representative" and absolute deviation from the "ideal district size" (the nationwide average district size), rather than the "relative difference between the number of persons per representative and the relative difference between each person's share of a representative" (as the equal proportions method does). J.S. App. 13a-14a. Finding that the Dean method minimizes the absolute differences under those measures, the court concluded that appellees had carried their initial burden of showing that a method other than equal proportions would "more closely meet" what it regarded as "the constitutional mandate of absolute population equality among districts." *Id.* at 15a.<sup>18</sup>

The court next held that appellants had not carried what it held to be their resulting burden under *Karcher* of affirmatively justifying the equal proportions method in these circumstances, J.S. App. 15a-19a, offering the view that it would be "difficult, if not impossible, to do so." *Id.* at 17a. Thus, the court discounted Congress's judgment that relative difference is a better measure of equity than absolute difference, on the ground that it was made "without benefit" of *Wesberry*. *Id.* at 16a.<sup>19</sup>

<sup>18</sup> The court rejected appellees' reliance on the Adams method, because, as the dissent explained, it results in a "quota violation" for four States (J.S. App. 15a n.5)—*i.e.*, "it assigns a number of representatives to a state that is neither of the two closest whole numbers to that state's exact, unrounded share of representation." *Id.* at 28a (O'Scannlain, J., dissenting). For example, although California's exact share of Representatives under the 1990 census is 52.124, the Adams method would allocate only 50 Representatives to California. *Ibid.*

<sup>19</sup> The court also discounted Congress's past reapportionment efforts on the ground that they "have been political in nature, involving compromises among the states." J.S. App. 16a-17a.

And it rejected appellants' contention that the equal proportions method is justified by mathematically demonstrable considerations of equity and fairness, observing that apportionment is not governed by "subjective mathematical or equitable concerns," and that "[t]he Constitution mandates apportionment 'among the several States . . . according to their respective Numbers,' not 'according to their respective Numbers and whatever other considerations Congress or its mathematicians may deem appropriate at any given time.'" *Id.* at 17a.

Finally, the court held that Congress had not made a "good faith effort" to achieve equal representation for equal numbers of people, "because the reapportionment process was automatic, and Congress, in its role as law and policy maker, had no part in the process." J.S. App. 18a. In the court's view, it would not be an "undue burden" for Congress, "once every decade, [to] apply various accepted statistical methods to the census results and determine which method best meets the Constitutional mandate for population equality among the districts." *Id.* at 18a-19a.

b. Circuit Judge O'Scannlain dissented. J.S. App. 20a-34a. Judge O'Scannlain pointed out that "the Framers were aware that the scheme they were creating would lead to the fractional interest problem," yet they "did not include in the Constitution a specific mathematical formula to address" it. *Id.* at 25a. In his view, appellees had failed to carry their threshold burden under *Karcher* of showing that the population differences under the formula Congress chose are avoidable, and that they result from a lack of good faith effort by Congress to achieve population equity in the context of the constitutional provisions requiring each State to have at least one Representative and barring congressional districts that straddle state lines. *Id.* at 26a. Because of these restrictions, Judge O'Scannlain reasoned, the standard of "precise numerical equality" announced in *Wesberry* and *Karcher* is "impossible to apply here." *Id.* at 26a-27a. "Indeed," he continued, "application of any of the apportionment formulae before [the] court results in congressional dis-

trict populations varying by hundreds of thousands of people between states." *Id.* at 27a. Thus, unlike intra-state redistricting, which involves the straightforward question of whether districts have the same population, apportionment among the States entails "the more complex task of evaluating the relative merits of plans which, by necessity, all fall far short of population equality." *Ibid.*

Judge O'Scannlain also disagreed with the majority's conclusion that the Dean method is statistically superior to the equal proportions method. He first noted that under the equal proportions method, "Montana's [single] congressional district is 48.0% larger than Washington's average district," but that under the Dean method (which would require the transfer of a House seat from Washington to Montana), the average size of Washington's districts would become 52.1% larger than the average size of Montana's. J.S. App. 29a. Next, Judge O'Scannlain pointed out that the equal proportions method performs better even under the majority's preferred test of "absolute difference from the ideal district," because in both Montana and Washington, the aggregate deviation by all districts from the ideal district size is smaller under the equal proportions method than under the Dean method. *Ibid.* Finally, Judge O'Scannlain noted that although the Dean method results in a narrower absolute difference between the single smallest district and single largest district in the Nation, "[w]hen all 435 districts are considered, the [equal proportions] method has the *least absolute population variance* from the ideal district size." *Id.* at 30a (citing Ernst Decl. ¶ 23 (1 J.A. 29-30)).



## SUMMARY OF ARGUMENT

I. The district court has held unconstitutional the Act of Congress that provides for apportionment of Representatives among the States by the method of equal proportions. That holding is without foundation in the Constitution.

A. Article I, Section 2, Clause 3 and the Fourteenth Amendment provide that Representatives "shall be apportioned among the several States \* \* \* according to their respective Numbers." Congress's selection from among methods that are rationally tied to the population of the States presents a political question that is not reviewable by the courts. See *Baker v. Carr*, 369 U.S. 186, 217 (1962). In the first place, the constitutional text prescribes no set formula for Congress to follow beyond the general declaration—which unquestionably is satisfied by the method of equal proportions—that apportionment shall be according to the "respective Numbers" (populations) of the States. Congress therefore has plenary authority under the Necessary and Proper Clause (Art. I, § 8, Cl. 18) to select what it regards as the most appropriate method. Moreover, there are no judicially discoverable and manageable standards for selecting a method of apportioning Representatives among the States; selection of a standard of equity against which to measure various alternatives requires an initial policy determination of a kind clearly committed to the political Branches; separation of powers principles require respect for a coordinate Branch's decisions concerning its own composition; and judicial review would disrupt apportionment at both the national and state levels.

B. The background and implementation of the Constitution's apportionment provisions refute the district court's holding that Congress's discretion is narrowly circumscribed and that the harmonic means method therefore must be preferred to the equal proportions method. The few relevant comments at the Constitutional Convention suggest an expectation on the part of some delegates that fractional remainders in allocating Representatives

to the States would be disregarded, and thus obviously do not support the district court's holding that Congress must take such remainders into account in a particular way. Moreover, the divergent views in Congress and the Executive Branch at the time of the first apportionment in 1792 strongly support a construction of Article I that permits various approaches to the problem. That construction is confirmed by Congress's subsequent practice of periodically adopting different approaches. The Fourteenth Amendment's incorporation of the relevant text of Article I therefore constitutes a ratification of the flexibility and discretion that Congress had exercised.

Congress's adoption of the method of equal proportions in 1941, after extensive study and on the advice of numerous experts, was fully consistent with its practice of revisiting the issue in light of accumulated experience. Congress reasonably concluded that equal proportions is preferable to other methods (including harmonic means) because it minimizes relative differences between States with respect to both average congressional district size and each person's share of a Representative. Subsequent studies and the record in this case confirm the soundness of Congress's judgment and demonstrate that equal proportions is superior in several other aspects as well.

*C. Wesberry v. Sanders*, 376 U.S. 1 (1964), does not undermine the constitutionality of 2 U.S.C. 2a. That decision, which involved a state legislature's drawing of congressional districts within a State, did not address the antecedent question, presented here, of how many Representatives Congress should apportion to the State in the first place. Moreover, the decision in *Wesberry* was based on Clause 1 of Article I, Section 2, which had been construed to confer a personal right to vote on the "People of the several States"; this case, by contrast, arises under Clause 3, which does not refer to the "People," but instead provides for apportionment of Representatives to the States themselves, based on their aggregate populations. But even if the principles of *Wesberry* were applicable, they are satisfied, in this special context, by the method of equal proportions.

II. Contrary to the district court's suggestion, nothing in Article I requires Congress itself to revisit the issue and pass a new apportionment act after each census. Congress may instead assign to the Executive the task of ascertaining the apportionment under standards it has established.

### ARGUMENT

#### **THERE IS NO BASIS IN THE CONSTITUTION FOR A COURT TO INVALIDATE THE APPORTIONMENT MADE BY 2 U.S.C. 2a**

The district court has held unconstitutional the Act of Congress that prescribes the formula for apportioning Representatives among the States following each decennial census. 2 U.S.C. 2a. Congress enacted that provision in 1941 after a century and a half of experimentation, studies, and debates regarding the most appropriate means of giving content to the general declaration in Article I, Section 2, Clause 3 of the Constitution—reiterated in Section 2 of the Fourteenth Amendment—that Representatives “shall be apportioned among the several States \* \* \* according to their respective Numbers.” The formula Congress chose (the method of equal proportions)—was repeatedly endorsed by experts from a mathematical perspective, and it has produced a fair reapportionment of the House of Representatives following each decennial census since 1941.

The district court has now cast aside Congress's considered judgment, finding another method of apportionment preferable under the single test the court believed should control implementation of Article I, Section 2, Clause 3 and Section 2 of the Fourteenth Amendment. That ruling is unprecedented. As the district court itself recognized, “[n]o state has heretofore turned to the judicial branch to challenge the method employed by Congress to apportion representatives among the several states.” J.S. App. 9a. The judgment below casts a shadow over the redrawing of congressional districts by the State Legislatures that is now well underway in reliance on the apportionment made by 2 U.S.C. 2a, and

creates uncertainty regarding the number of electors to which each State will be entitled in the 1992 election of the President and Vice President. U.S. Const. Art. II, § 1, Cl. 2; 3 U.S.C. 3.

The district court's ruling is as wrong as it is unprecedented. The method of equal proportions unquestionably apportions Representatives among the States “according to their respective Numbers.” That is all Article I, Section 2, Clause 3 and Section 2 of the Fourteenth Amendment require. Nothing in that general constitutional standard suggests that a court may second-guess Congress's choice among methods of apportionment that are rationally tied to the population of the States, much less that the Constitution mandates use of the particular mathematical formula that appellees and the district court would prefer.

#### **I. THE CONSTITUTION GRANTS CONGRESS BROAD DISCRETION IN APPORTIONING REPRESENTATIVES AMONG THE STATES, AND CORRESPONDINGLY PERMITS ONLY THE NARROWEST SCOPE OF JUDICIAL REVIEW**

The text and structure of the Constitution, as well as the history of the organization of the Government under its provisions, refutes the district court's holding that Congress's power to select a means of apportioning Representatives among the States is narrowly circumscribed, and that 2 U.S.C. 2a is invalid for that reason. The Constitution confers plenary authority and discretion on Congress for this purpose. Congress has not assigned any role to the courts in apportioning Representatives among the States. Compare *Luther v. Borden*, 48 U.S. (7 How.) 1, 42-43 (1849). It instead has prescribed the method of apportionment, and assigned to the President, assisted by the Secretary of Commerce, the responsibility for ascertaining the number of Representatives to which each State is entitled under that method. This arrangement retains responsibility for apportionment of Representatives (and Presidential electors) within the politi-



cal Branches. It follows that the Constitution permits no more than the narrowest scope of judicial review—in order to determine (in a case otherwise properly before a court) whether the apportionment is contrary to an explicit constitutional limitation on that authority. In this case, then, the court's role could extend no further than determining whether the apportionment is rationally tied to the "respective Numbers" of the States.

**A. Congress's Selection From Among Apportionment Methods That Are Rationally Tied To The Population Of The States Presents A Political Question That Is Not Reviewable By The Courts**

In declaring invalid the apportionment of Representatives made in the manner Congress itself prescribed, the district court has arrogated to itself the power to decide a political question in the most classic sense. As this Court explained in *Baker v. Carr*, 369 U.S. 186 (1962), the political question doctrine is "essentially a function of the separation of powers," *id.* at 217, deriving from "the relationship between the judiciary and the coordinate Branches of the Federal Government," *id.* at 210. In *Baker v. Carr* itself, because the separation of powers among the Branches of the Federal Government was not involved, the Court held that a State's drawing of districts for election to the state legislature did not present a non-justiciable political question. For the same reason, the Court similarly held in *Wesberry v. Sanders*, 376 U.S. at 5-7, that a federal court could review a state legislature's drawing of congressional districts within a State. This case, obviously, is different. Appellees seek review of Congress's apportionment of Representatives among the States. It therefore goes to the heart of the separation of powers and the "relationship between the judiciary and the coordinate Branches of the Federal Government." 369 U.S. at 210.

In *Baker v. Carr*, the Court identified six "formulations" that signal the presence of a question that the Constitution commits to the political Branches (369 at 217):

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

All of these factors are present here, and establish that the district court erred in going beyond a very narrow inquiry into whether Congress's chosen system rationally effectuated the Constitution's requirement that Representatives be apportioned according to the "respective Numbers" of the States.

1. a. Article I, Section 2, Clause 3 provides that "Representatives shall be apportioned among the several States \* \* \* according to their respective Numbers." Although the Constitution does not expressly provide that the responsibility for apportionment resides in Congress, the Framers clearly intended that result,<sup>20</sup> and Congress's power to apportion Representatives "has always been

<sup>20</sup> See, e.g., *The Federalist*, No. 58, quoted at note 21, *infra*; 1 M. Farrand, *The Records of the Federal Convention of 1787* at 570-571 (1966 ed.) (Edmund Randolph); *id.* at 559, 571, 583-584 (Gouverneur Morris); *id.* at 578 (George Mason); *id.* at 584-585 (James Madison); *id.* at 602 (Roger Sherman). In fact, the resolutions of the Convention that were referred to the Committee of Detail expressly provided that "the Legislature of the United States shall be authorised from Time to Time to apportion the Number of Representatives" and "to regulate the Number of representatives \* \* \* upon the Principle of the Number of their Inhabitants." 2 Farrand at 130; see also *id.* at 139 ("the census being taken and returned, the legislature shall apportion the representation"); *id.* at 178 ("the Legislature shall \* \* \* regulate the number of representatives by the number of inhabitants"); *id.* at 164 (same).

acted upon, as irresistibly flowing from the duty positively enjoined by the Constitution." *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) at 619.

Because the constitutional text furnishes no set formula for Congress to follow, Congress may exercise the full measure of power vested in it by the Necessary and Proper Clause for "carrying into Execution" all powers vested by the Constitution in the Government of the United States. Art. I, § 8, Cl. 18; see *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420-421 (1819). Thus, the authority to apportion Representatives is plenary, *Buckley v. Valeo*, 424 U.S. 1, 90-91, 132 (1976), and Congress may "select[] the policy which in its judgment best effectuates the constitutional aim." *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966). This authority under Article I is augmented by Congress's power under Section 5 of the Fourteenth Amendment to enforce the provisions of that Amendment, which include the parallel apportionment provision.

The breadth of Congress's discretion in this regard is underscored by a number of closely associated provisions of the Constitution. First, apportionment—and the number of Representatives a State will receive under *any* apportionment method—is integrally related to the total number of Representatives in the House. The Constitution contains no restrictions on Congress's determination of a suitable size for the House of Representatives (aside from setting a minimum of one Representative for every State and a maximum of one Representative for every 30,000 persons), and the history of the apportionment statutes shows that the number of Representatives has been reached through political compromise, typically in light of its impact on reapportionment. See pages 5-14, *supra*.<sup>21</sup> The fact that a question so basic to the structure

<sup>21</sup> See also *The Federalist* No. 58, at 394 (J. Madison) (J. Cooke ed. 1961):

The large States \* \* \* will have nothing to do but to make reapportionments and augmentations mutually conditions of each other; and the senators from all the most growing States

of the Government as the size of the House of Representatives (and the Electoral College) is left to the discretion of Congress strongly reinforces the conclusion that Congress likewise has essentially unfettered discretion to select what it regards as the most appropriate method for apportioning whatever number of Representatives it chooses, so long as the apportionment is rationally tied to the population of the States.

This conclusion is further underscored by the fact that Article I, Section 2, Clause 3—providing that the decennial census shall be made "in such Manner as they [the Congress] shall by Law direct"—commits the compilation of the data on which the apportionment is based to Congress's discretion. Cf. *Baldrige v. Shapiro*, 455 U.S. at 347-348 ("Under Art. I, § 2, cl. 3 \* \* \*, responsibility for conducting the decennial census rests with Congress.")<sup>22</sup> Finally, the Constitution provides that each House is the judge of the election of its Members (Art. I, § 5, Cl. 1), which presents a political question that no court may review.<sup>23</sup>

will be bound to contend for the latter, by the interest which their States will feel in the former.

See generally *id.* at 391-397; *id.*, No. 55 (J. Madison), at 373 ("no political problem is less susceptible of a precise solution, than that which relates to the number most convenient for a representative legislature").

<sup>22</sup> See *Tucker v. Department of Commerce*, 135 F.R.D. 175 (N.D. Ill. 1991) (whether to adjust census for undercount presents non-justiciable political question), appeal pending, No. 91-2051 (7th Cir.); but see *Carey v. Klutznick*, 637 F.2d 834 (2d Cir. 1980) (adjustment claim justiciable), stay granted, 449 U.S. 1068 (1980), followed on subsequent appeal, 653 F.2d 732, 736-738 (2d Cir. 1981) (but expressing concerns about manageability of suit because of impact on other States); *City of New York v. United States Dep't of Commerce*, 713 F. Supp. 48, 53-54 (E.D.N.Y. 1989) (adjustment claim reviewable under arbitrary and capricious standard of Administrative Procedure Act, 5 U.S.C. 706(2)(A)).

<sup>23</sup> *Rondebush v. Hartke*, 405 U.S. 15, 18-19 (1972); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929); *Reed*



In light of the Constitution's commitment of these subjects relating to the composition of the House of Representatives to the political Branches, a judicial decree striking down Congress's apportionment of Representatives constitutes an extraordinary intrusion into the political process. We do not suggest that *all* matters concerning the apportionment of Representatives among the States are necessarily nonjusticiable. We assume that if an Act of Congress apportioning Representatives was plainly contrary to an explicit textual limitation—*e.g.*, if no Representatives were assigned to, say, Montana; if the total number of Representatives exceeded one for every 30,000 persons; or if the apportionment bore no relation to the States' populations, and therefore could not plausibly be regarded as being "according to their respective Numbers"—a court would not be barred from so ruling, in a case that was otherwise properly before it.<sup>24</sup> But separation of powers principles—on which the political question doctrine rests—bar a court from setting aside Congress's selection of a particular method of apportionment that is not demonstrably contrary to such an explicit textual limitation on its discretion. Compare *Coleman v. Miller*, 307 U.S. 433, 447-450, 453-456 (1939); *United States v. Sprague*, 282 U.S. 716, 732 (1931); *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

Here, the method of equal proportions mandated by 2 U.S.C. 2a is not demonstrably contrary to the express terms of Article I, Section 2. To the contrary, it unquestionably produces an apportionment of Representatives among the several States "according to their respective Numbers." As we have explained at page 11, *supra*,

*v. County Commissioners*, 277 U.S. 376, 388 (1928); *Morgan v. United States*, 801 F.2d 445, 446-450 (D.C. Cir. 1986) (Scalia, J.), cert. denied, 480 U.S. 911 (1987); *McIntyre v. Fallahay*, 766 F.2d 1078, 1081 (7th Cir. 1985).

<sup>24</sup> Compare *Powell v. McCormack*, 395 U.S. 486 (1969) (deciding that the qualifications of Representatives expressly set forth in Article I, Section 2, Clause 2, are exclusive). See *Morgan v. United States*, 801 F.2d at 448; *McIntyre v. Fallahay*, 766 F.2d at 1081 n.1.

each State's priorities under the equal proportions method are based on a formula in which the numerator is the State's population (and the denominator is the geometric mean between the number of Representatives the State has already received in the allocation and the next highest number). Furthermore, as Judge O'Scannlain pointed out in his dissent, in every apportionment since the method of equal proportions was adopted in 1941, each State has been assigned one of the two whole numbers of Representatives closest to that State's exact, unrounded share. J.S. App. 29a. In fact, the equal proportions method would have yielded that result in *every* apportionment since 1792. Ernst Decl. ¶ 22 (1 J.A. 29).

This year, the equal proportions method allocated to both Montana and Washington the closest whole number of Representatives: Montana's exact share is 1.404, and it received one Representative, while Washington's exact share is 8.538, and it received nine Representatives. Ernst Decl., Exh. B (2 J.A. 76-77). Although the equal proportions method does not always round a State's fractional remainder up or down to the closest whole number in this manner (*ibid.*), there is no textual basis for the district court's belief that Article I, Section 2 *requires* the *opposite* result in this case—*i.e.*, that Montana rather than Washington must receive an additional Representative, even though Washington has a higher fractional remainder.

2. Because the equal proportions method is fully consistent with the only textual requirement regarding the apportionment of Representatives among the States (that it be "according to their respective Numbers"), the judgment below should be reversed on this ground alone. But other factors identified in *Baker v. Carr* reinforce the textual commitment of the apportionment issue to the political Branches. For example, the alternative methods studied by the NAS committees and other experts also apportion Representatives according to a formula in which the population of the State is the numerator. See page 12, *supra*. Accordingly, we may assume for

present purposes that those alternative methods also satisfy the constitutional standard that Representatives be apportioned among the States "according to their respective Numbers." But as Congress itself obviously concluded over the decades, nothing in Article I or the Fourteenth Amendment suggests that Congress is *required* to adopt any particular method (especially the never-used Dean or Adams method suggested by appellees), or to reject the equal proportions method upon which it ultimately settled. There is, in other words, a "lack of judicially discoverable and manageable standards" on the question. 369 U.S. at 217; see also *Coleman v. Miller*, 307 U.S. at 453-454.

As between any two States, the equal proportions method minimizes the relative (percentage) difference between the number of persons per Representative and the number of Representatives per person. The district court found the Dean method preferable because it minimizes the absolute difference in the number of Representatives per person. The other methods discussed above would be superior under still other measures of equity. See page 13, *supra*. The Constitution, however, does not single out any one of those measures of equity as controlling; that assessment is left to Congress, which is in the best position to undertake the necessary legislative fact-finding, weigh the competing equities of the States, and make essential "choices about the nature of representation." *Burns v. Richardson*, 384 U.S. 73, 92 (1966). Thus, judicial review of Congress's selection from among apportionment methods that are rationally tied to the population of the States is barred because of "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217; see also *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986); *United States v. Mandel*, 914 F.2d 1215, 1222 (9th Cir. 1990).

3. Other factors set forth in *Baker v. Carr* illuminate the "appropriateness under our system of government of attributing finality to the action of the political depart-

ments" in this setting. *Coleman v. Miller*, 307 U.S. at 454. First, because "legislative reapportionment is primarily a matter for legislative consideration and determination" even where the separation of powers between coordinate Branches of the Federal Government is not implicated, *Reynolds v. Sims*, 377 U.S. 533, 586 (1964), a federal court cannot "undertak[e] independent resolution" of the apportionment of Representatives by Congress itself "without expressing lack of the respect due [a] coordinate branch[] of government" on a matter as central to its political character as its own composition. 369 U.S. at 217.

Second, under the largely self-executing apportionment mechanism Congress has prescribed in 2 U.S.C. 2a, the President must send a formal statement to the House by the end of the census year containing the number of Representatives to which each State is entitled, and the Clerk must promptly certify the entitlement to the States, so that they may complete their own reapportionment responsibilities expeditiously. Judicial review in this context would seriously disrupt, confuse and delay apportionment within the States. There accordingly is "an unusual need for unquestioning adherence to a political decision already made." 369 U.S. at 217.<sup>25</sup>

Finally, litigation such as this would inevitably create a serious "potentiality of embarrassment from multifarious pronouncements by various departments on one question." 369 U.S. at 217. The total of 435 Representatives established by current law constitutes a pool in which all States have an interest. *Carey v. Klutznick*,

<sup>25</sup> Compare *Morgan v. United States*, 801 F.2d at 450 (need for "quick, decisive resolution of election controversies"); see also *Nixon v. United States*, 938 F.2d 239, 245-246 (D.C. Cir. 1991) (procedures for trial of impeachment present nonjusticiable political question), petition for cert. pending, No. 91-740; cf. *Morris v. Gressette*, 432 U.S. 491, 500-505 (1977) (implied preclusion of judicial review under APA of Attorney General's refusal to interpose objection to change in voting law under Section 5 of Voting Rights Act, 42 U.S.C. 1973c, because of potential to delay state and local implementation).



653 F.2d at 736-737. As a result, a judicial determination that one State is entitled to an additional Representative means that a Representative must be taken away from another State. It is for this reason that the State of Washington (which would lose a Representative to Montana under the Dean method suggested by appellees and the district court) has chosen to file an amicus brief in this Court. But because Washington is not a party to the case, the federal district court in Montana could not realistically enforce an order purporting to mandate the transfer of a Representative from Washington to Montana.<sup>26</sup> More broadly, the district court could not properly develop its own plan for apportionment of Representatives among the States, because that would usurp a function that concededly is assigned to Congress under the Constitution. See *Saunders v. Wilkins*, 152 F.2d 235, 238 (4th Cir. 1945), cert. denied, 328 U.S. 870 (1946); compare *Gilligan v. Morgan*, 413 U.S. 1, 8-12 (1973); *id.* at 14 (Blackmun, J., concurring). Nor could the district court order Congress to reapportion Representatives among the States in a manner acceptable to the court; such a decree would be barred by the immunities of Congress and its Members (see Art. I, § 6, Cl. 1 (Speech or Debate Clause)) and would require the court to "control the legislature," relief that "savours too much of the exercise of political power to be within the proper province of the judicial department." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831). No doubt it was for reasons such as these that although the district court declared 2 U.S.C. 2a unconstitutional, it declined to order an actual reapportionment in this case.<sup>27</sup>

<sup>26</sup> The only apparent enforcement mechanism would be for the House to refuse to seat the ninth Representative from Washington—a matter that the courts may neither direct nor control. See *Luther v. Borden*, 48 U.S. (7 How.) at 42.

<sup>27</sup> In addition to declaring 2 U.S.C. 2a unconstitutional, the judgment below permanently enjoins the Secretary of Commerce, Director of the Bureau of the Census, and Clerk of the House of Representatives from "effecting reapportionment of the United

Furthermore, another challenge to 2 U.S.C. 2a has been brought before a different three-judge district court by the Commonwealth of Massachusetts, which advocates use of the Webster method. That method would result in a transfer of one Representative from Oklahoma to (not surprisingly) Massachusetts, while leaving the allocation to all other States (including Montana and Washington) unaffected. *Massachusetts v. Mosbacher*, Civ. No. 91-11234WD (D. Mass.) (argued Dec. 7, 1991). Regardless of what the district court decides in that case, its decision will conflict with that of the district court here—and thereby create irreconcilable demands upon a fixed number of Representatives. This judicially driven Balkanization process underscores the wisdom of leaving the apportionment of Representatives where the Constitution places it: in Congress itself—a forum in which *all* States are present in the manner contemplated by the Framers, and in which the States, through their Representatives,

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States House of Representatives under the provisions of that said statute." J.S. App. 48a. However, appellants have already completed all of the actions required of them by 2 U.S.C. 2a for the current reapportionment, according to the method of equal proportions. The States are now free to conduct elections for the number of Representatives they have been allocated under that method. The injunction against the Secretary, Director, and Clerk therefore has no impact for this apportionment.

Appellees concede that "the language of the final judgment may not literally provide coercive relief" with respect to this year's apportionment, and they contend that "the only way to give effect to the plain language of the court's findings is to void the certificates of entitlement issued in January 1991." Mot. to Aff. 16 n.8. However, under 2 U.S.C. 2a, the Clerk performs only the ministerial task of notifying the States of the number of Representatives to which they are entitled under the President's statement. A judicial decree purporting to void the certificates the Clerk sent to the States would not alter the apportionment. Rather, under 2 U.S.C. 2a(b), it is the statement of the President that determines the number of Representatives to which "[e]ach State shall be entitled"; yet appellees understandably made no effort to join the President as a defendant or to seek relief against him. See J.S. 24-25 n.19.



may arrive at what they regard as a proper resolution of this quintessentially political issue.

**B. The Background Of The Constitution's Apportionment Provisions And the History Of Their Implementation Confirm Congress's Discretion And The Validity Of The Equal Proportions Method**

The district court's holding that Congress's discretion in apportioning Representatives is narrowly circumscribed—and that the harmonic means (Dean) method must be preferred to the equal proportions method as a matter of constitutional compulsion—is refuted by the background of the apportionment provisions in Article I and the Fourteenth Amendment and by 200 years of practical experience in their implementation.

1. The delegates to the Federal Convention of 1787 generally focused on larger issues concerning composition of the Legislative Branch—especially the Great Compromise between the small and large States. Although the Framers chose not to leave apportionment of Representatives entirely to Congress's discretion, and instead required periodic apportionment on the basis of population (1 Farrand at 571, 581, 595-596, 584-585, 579, 578), the records of the Convention contain little specifically on the problem of fractional remainders. The few statements on point suggest an expectation on the part of at least several delegates that fractions would be disregarded.<sup>28</sup> Subsequent practice has not, of course, conformed to that expectation (at least since 1842), and appellees under-

<sup>28</sup> See 1 Farrand at 559 (Nathaniel Gorham) ("Fractions could not be observed."); *id.* at 602 (Oliver Ellsworth) ("fractions can not be regarded in apportioning the < no. of > representatives"); 2 *id.* at 358 (Oliver Ellsworth) ("A State might have one Representative only, that had inhabitants enough for 1½ or more, if fractions could be applied"). There are, however, indications that fractions were not entirely disregarded in the initial apportionment of Representatives provided for in Article I, Section 2, Clause 3 itself. See 3 Farrand at 260 (statement of Caleb Strong in the Massachusetts ratifying Convention); 3 Annals of Cong. 249 (1791) (Rep. Sedgwick).

standably do not urge that it be enforced in this case, since it would not result in an additional Representative for Montana this year. The relevant point for present purposes, however, is that the debates obviously lend no support to the district court's view that Article I, Section 2, Clause 3 implicitly embodies the *contrary* principle—namely, that Congress *must* take fractions into account, and apparently must do so pursuant to the complex formula of harmonic means. See page 12, *supra*. The latter notion in particular ignores "that it is a *constitution* we are expounding," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 407, and it also cannot be squared with Madison's observation, concerning the ratio between Representatives and the people, that "[n]othing can be more fallacious than to found our political calculations on arithmetical principles." *The Federalist* No. 55, at 374.<sup>29</sup>

2. The history of apportionment since 1787 rests on a construction of the Constitution that permits Congress to select from a variety of possible apportionment methods.

a. The circumstances surrounding passage of the first apportionment statute show that the Framers—many of whom were then serving in Congress or the Executive branch—had sharply contrasting views on the problem

<sup>29</sup> In September 1789, Congress proposed an amendment to the Constitution to provide that once the number of Representatives reached a specified level, "the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons." 1 Stat. 97. That amendment elaborated upon the general standards already set forth in Article I to place outer limits on Congress's decisions concerning the composition of the House. The principle expressed by the amendment—that Congress may "regulate" the "proportion"—demonstrates that the contemporaneous view of Congress's power in this area when the Constitution was adopted is inconsistent with the proposition that Congress's power must be narrowly circumscribed in the manner the district court and appellees now urge. Although the amendment fell one State short of ratification, the apparent reasons are unrelated to the amendment's recognition of a broad power in Congress to "regulate" apportionment of Representatives among the States. See generally Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1137-1143 (1991).

of fractional remainders. In the Second Congress, the House initially passed an apportionment bill based on what has come to be known as the Jefferson method, under which fractions are disregarded. The Senate countered with a bill allocating a total of 120 Representatives; although the method of apportionment was not specified, the bill apparently was designed to achieve the desired total by allocating Representatives to the States having the highest fractional remainders (what has come to be known as the Vinton or Hamilton/Vinton method). In March 1792, after considerable debate,<sup>30</sup> the House acquiesced in the Senate bill, which passed both Houses by a narrow margin. See 3 Annals of Cong. 482-483, 540-541 (1792); S. Doc. No. 119, 22d Cong., 1st Sess. 10-11 (1832); H.R. Doc. No. 234, 22d Cong., 1st Sess. 6, 10 (1832); 1 J. Story, *Commentaries on the Constitution* §§ 680-683 (2d ed. 1851).

Secretary of State Jefferson recommended that the bill be vetoed because (1) it assigned Representatives on the basis of fractional remainders, which, he believed, the Constitution does not allow; (2) there was no single ratio that would produce the apportionment prescribed by the bill; and (3) one of the ratios on which the apportionment apparently was based exceeded the constitutional maximum of one Representative for every 30,000 persons (see Art. I, § 2, Cl. 3), which in his view must be applied on a State-by-State basis, rather than with reference to the population of the Nation as a whole. Attorney General Randolph agreed with Jefferson on the latter point. See H.R. Doc. No. 234, *supra*, at 9-12. By contrast, Secretary of the Treasury Hamilton recommended against a veto. Hamilton was of the opinion that the maximum of one Representative for every 30,000 persons could be construed to apply either on a State-by-State or nationwide basis, and that the actual apportionment was "most consistent with *equality*"; he accordingly

<sup>30</sup> See, e.g., 3 Annals of Cong. 200-204, 243-250, 254-274 (1791); *id.* at 331-336, 403-405, 407-414 (1792).

believed it "proper that the legislative sense should prevail." *Id.* at 8. Secretary of War Knox also recommended against a veto. *Id.* at 8-9.

On April 5, 1792, President Washington vetoed the bill on the grounds that (1) there was "no one proportion or division which, applied to the respective numbers of the States, will yield the number and allotment of Representatives proposed by the bill"; and (2) "the bill has allotted to eight of the States more than one [Representative] for every thirty thousand" persons. 3 Annals of Cong. 539 (1792). Congress failed to override the veto, *id.* at 541, and soon thereafter it passed a law that met the President's objections and disregarded all fractions. Act of Apr. 14, 1792. See generally *Fair Representation* at 10-22.

The divergent views of the Members of Congress and the Executive Branch who were involved in the first apportionment strongly support the conclusion that Article I, Section 2, Clause 3 reasonably can be construed to permit various approaches to the allocation of Representatives among the States. That contemporaneous understanding is entitled to considerable weight in construing the Constitution. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 723-724 (1986); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Moreover, the Second Congress's decision to use a method that disregarded fractions obviously undermines the district court's notion that Article I, Section 2, Clause 3 actually *requires* fractions to be taken into account in a particular way.

b. The Jefferson method was used in the next four apportionments. In 1832, however, John Quincy Adams advocated a method that was the mirror image of Jefferson's: it would have required that an additional Representative be awarded for every fractional remainder, no matter how small. In the same year, Daniel Webster first proposed the method of major fractions, which was utilized in 1842 and then replaced by the Vinton method in 1850. See pages 5-6 & nn.4, 5, *supra*.



The district court, in support of its holding that the Constitution requires a method that minimizes absolute differences between States with respect to the number of persons per Representative (i.e., the average size of their congressional districts), relied on Webster's statement in 1832 that Congress must apportion Representatives among the States according to their respective numbers "as near as may be." J.S. App. 11a n.2 (quoting *Fair Representation* at 31); see S. Doc. No. 119, *supra*, at 4. There are two ironies in the court's invocation of Webster's remarks. First, he was advocating the method of major fractions, which minimizes absolute differences between each person's share of a Representative, *not* the number of persons per Representative (the measure of equity the district court found to be constitutionally compelled). Second, the major fractions method Webster endorsed would *not* yield an additional Representative for Montana this year. 2 J.A. 76. In addition, Webster expressed the view—contrary to that of the district court—that "the constitution prescribes no particular process by which th[e] apportionment is to be wrought out" (S. Doc. No. 119, *supra*, at 5), and he urged a standard of "relative equity" (*id.* at 4, 5, 6), which of course is the whole point of the equal proportions method that the district court found to be constitutionally deficient.<sup>31</sup>

<sup>31</sup> Webster's statement cuts against the district court's holding in another respect as well. Webster described the opposition to his method as assuming that "every member of the House of Representatives represents, or ought to represent, the same, or nearly the same, number of constituents; that this number is to be regarded as an integer; and anything less than this is therefore called a fraction or a residuum, and cannot be entitled to a representative." S. Doc. No. 119, *supra*, at 8. Webster responded that the Constitution "contemplates no \* \* \* common number for the constituents of a member of the House of Representatives," but instead "provides for the apportionment of representatives among the several States according to their respective numbers, and stops there"; the Constitution, he said, "makes no provision for the representation of districts," which it "leaves to State legislation," since the right to a "portion of the representative power \* \* \* belongs to the

c. The Fourteenth Amendment was proposed in 1866 and ratified in 1868 against the backdrop of Congress's consideration and use of a number of different apportionment methods over the preceding decades. The first sentence of Section 2 of the Amendment reiterates verbatim the relevant language in Article I, Section 2, Clause 3. In light of Congress's past practice, the incorporation of this language into the Fourteenth Amendment is most appropriately viewed as a ratification of the flexibility it was understood to confer on Congress to utilize whatever population-based apportionment method Congress deemed appropriate. See *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Companies*, 111 S. Ct. 615, 624 (1991); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378-382 (1982). Moreover, as Congress was well aware at the time it proposed the Fourteenth Amendment, the Census Act of 1850 then required that apportionment be conducted in accordance with the Vinton method. See pages 7-8, *supra*.<sup>32</sup> It therefore cannot seriously be maintained that the Vinton method, if used today, would *violate* the Constitution; yet that conclusion logically follows from the district court's holding that the particular measure of equity served by the harmonic means method is constitutionally compelled.

State, as a State." *Ibid.* Webster's emphasis on the State's overall share of representation in the House substantially undermines the district court's holding that the exclusive test of compliance with Article I, Section 2, Clause 3 is a comparison of the average sizes of congressional districts within the States.

<sup>32</sup> See Cong. Globe, 39th Cong., 1st Sess. 357-358 (1866) (Rep. Conkling) (describing table showing apportionment under Section 2 calculated "in the mode practiced under the present law," which was based on "largest fractions"). There were frequent references by other Members to Rep. Conkling's table. *Id.* at 404 (Rep. Lawrence); *id.* at 1103 (Rep. Stewart); *id.* at 1232 (Sen. Doolittle); see also *id.* at 1315 (Rep. Ashley); *id.* at 2767 (Sen. Howard); *id.* at App. 256 (Rep. Baker).



d. Congress continued to apportion Representatives by the Vinton method until 1911.<sup>33</sup> It then used the major fractions method on several occasions before firmly settling on the equal proportions method in 1941. The background of the 1941 Act, and its 1929 precursor, shows that Congress continued to construe the relevant constitutional provisions as not compelling it to adopt any particular apportionment method. That was the view, for example, of Senator Hugo Black,<sup>34</sup> who endorsed the equal proportions method<sup>35</sup>—and who later, as a Member of this Court, wrote the decision in *Wesberry v. Sanders*, on which the district court and appellees now principally rely in condemning that method.

<sup>33</sup> The apportionment acts passed between 1872 and 1911 required that the Representatives allocated to each State be elected from districts "containing as nearly as practicable an equal number of inhabitants." Act of Feb. 2, 1872, § 2, 17 Stat. 28; Act of Feb. 25, 1882, § 3, 22 Stat. 5; Act of Feb. 7, 1891, § 3, 26 Stat. 735; Act of Jan. 16, 1901, § 3, 31 Stat. 734; Act of Aug. 8, 1911, § 3, 37 Stat. 14; see *Wood v. Broom*, 287 U.S. 1, 6 (1932). Thus, Congress, which has plenary authority in this area, apparently perceived no inconsistency between a requirement (such as that announced in *Wesberry*) that districts within a State be equal in population to the extent practicable, and its use of a method for apportioning Representatives among the States that is not based on an inflexible rule of absolute equality (to the extent practicable) of average district sizes between States.

<sup>34</sup> See 70 Cong. Rec. 4244 (1929) (quoting the 1921 report of the advisory committee to the Director of the Census Bureau) ("It is clear that the Constitution requires that the allocation of Representatives among the several States shall be proportionate to the distribution of population. It is not equally clear that there is anything in the constitutional requirement which suggests that one of the forms in which such apportionment ratios or proportions may be expressed should be preferred to another.") See also 87 Cong. Rec. 8055 (1941) (Sen. Burton); S. Rep. No. 2, 71st Cong., 1st Sess. 5 (1929); 71 Cong. Rec. 1613-1614 (1929) (Sen. Vandenberg); *id.* at 1842 (Sen. Gillett); 13 Cong. Rec. 1103 (1882) (Rep. Converse).

<sup>35</sup> 70 Cong. Rec. 4244 (1929); 71 Cong. Rec. 1336, 2071-2073 (1929).

Congress's formal adoption of the equal proportions method in 1941 followed extensive consideration of the issue stretching back over two decades. Congress acted with full knowledge of the historical practice and on the basis of the advice of numerous experts in the field, including the advisory committee to the Director of the Census in 1921 and the special NAS committee in 1929.<sup>36</sup> As we have explained, those studies proved that in a pairwise comparison between any two States, the equal proportions method minimizes the relative (percentage) difference in the number of persons per Representative and each person's share of a Representative, which were thought to be better indicators of equity than the absolute difference in either ratio. By contrast, harmonic means and major fractions were found to minimize only absolute differences, and to do so only with respect to one of the standards just mentioned (*i.e.*, either the number of persons per Representative or each person's share of a Representative, but not both). See also pages 46-47, *infra*.<sup>37</sup>

<sup>36</sup> See H.R. Rep. No. 30, 77th Cong., 1st Sess. 1-2 (1941); S. Doc. 304, 76th Cong., 3d Sess. (1940); 87 Cong. Rec. 8052 (1941) (Sen. Caraway); *id.* at 8058 (Sen. Burton); *id.* at 1128 (Rep. Mills); 71 Cong. Rec. 2071-2073 (1929) (Sen. Black); *id.* at 2151-2152 (Sen. Pittman); *id.* at 2715 (Rep. Gibson); 70 Cong. Rec. 4964-4967 (1929). A Brookings Institution study in 1941 likewise found equal proportions to be "more desirable than any other method that has been devised." *Congressional Apportionment* at 72.

<sup>37</sup> "The relative difference between two numbers consists of subtracting the smaller number from the larger number and then dividing the result by the smaller number." Ernst Decl. ¶ 12 (J.A. 24); see NAS Report (J.A. 18); *Congressional Apportionment* at 8.

The Ernst Declaration filed in the district court illustrates the significance of the distinction between absolute and relative differences by an example in which the nationwide average district size is 600,000, and States A and B have average district sizes of 1,200,000 and 300,000, respectively. For State A, the absolute difference between the nationwide average and the statewide average is 600,000; for State B, it is 300,000. However, both States have relative differences from the nationwide average of 100%, because in State A the average district size is twice as large as the national

In addition, the studies concluded that equal proportions occupies a neutral position with respect to large and small States, while major fractions favors large States and harmonic means favors small States. See page 13, *supra*.

With this legislative record before it, there can be little question that Congress conscientiously carried out its responsibility to apportion Representatives among the States by adopting a method that is both equitable and tied to the respective populations of the States. Neither the district court nor appellees have pointed to any subsequent developments that cast the slightest doubt on the reasonableness of Congress's judgment in 1941. To the contrary, further studies and the record in this case substantiate the soundness of Congress's choice. As we have explained (see pages 14-15, *supra*), the 1948 NAS Report by leading mathematicians demonstrated that the equal proportions method performs better than each of the four alternatives under three out of four measures of absolute and relative equity. App., *infra*, 8a-9a. In addition, the Ernst Declaration, which appellees do not dispute (see J.S. App. 31a (O'Scannlain, J., dissenting)), shows that the equal proportions method also minimizes the total variance of the 435 congressional districts in the Nation from the ideal (nationwide average) district size. ¶ 23 (1 J.A. 29-30); accord, *Fair Representation* at 104-105.<sup>38</sup>

average, and in State B it is twice as small. ¶ 21 (J.A. 28). "In relative terms, any district of size less than 300,000 would present a greater inequity than a district of size 1,200,000. In absolute terms \* \* \*, a district of size 1,200,000 presents a greater inequity than even a district of size 1 (which has an absolute difference of 599,999)." *Ibid*.

<sup>38</sup> The variance is the sum of the squares of the deviations by each district from the ideal district size.

The record in this case also shows that as between Washington and Montana, the equal proportions method minimizes the sum of the absolute deviations from the ideal district size. Thus, under the equal proportions method, the population of Montana's single district (803,655) is 231,189 persons larger than the ideal district size (572,466), while under the Dean method, Montana would have two

4. In sum, the history of the implementation of the relevant provisions of Article I and the Fourteenth Amendment establish that Congress has periodically revised its approach to apportionment based on its accumulated experience, expanding knowledge in the field of statistical analysis, and considerations of equity and fairness, while adhering to the single textual requirement that apportionment of Representatives among the States be tied to "their respective Numbers." That evolutionary approach has necessarily rested on the understanding that the Constitution itself does not mandate any one solution to the problem. Such a longstanding, practical construction of the Constitution is entitled to great weight, *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981), "especially \* \* \* in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny." *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (regulation of elections under Art. I, § 4); see also *McPherson v. Blacker*, 146 U.S. 1, 27, 33 (1892) (selection of Presidential electors). That is all the more so since from the outset, leading figures in the Nation's constitutional history—Washington, Jefferson, Hamilton, Randolph, Webster, Quincy Adams, and Black—have advocated differing approaches. On this historical record, there is no merit whatever to the district court's view that the Constitution requires that Congress now discard the equal proportions method it adopted in 1941 after extensive consideration, in favor of the never-used harmonic means method.

districts that together would deviate a total of 341,276 from the ideal district size. Correspondingly, under the equal proportions method, Washington has nine districts with a total deviation of 264,249 from the ideal district size, while the Dean method would result in a total deviation of 308,216. J.S. App. 29a-30a (O'Scannlain, J., dissenting); Ernst Decl. ¶¶ 18, 19 (1 J.A. 26-27).



**C. *Wesberry v. Sanders* And Its Progeny Do Not Undermine The Constitutionality Of 2 U.S.C. 2a**

Without even discussing the 200-year history of Congress's apportionment of Representatives, the district court held 2 U.S.C. 2a unconstitutional in reliance on *Wesberry v. Sanders*, 376 U.S. 1 (1964). See J.S. App. 9a-18a. *Wesberry*, however, is wholly inapposite here.

1. *Wesberry* and its progeny concerned a *State legislature's* drawing of congressional districts *within* a State, from which the people of the State would elect whatever number of Representatives were allocated to it. This case, by contrast, concerns *Congress's* apportionment of Representatives *among* the States. In *Wesberry*, the Court held that a state legislature must seek to achieve the standard of "one person, one vote" by drawing congressional districts within the State that, as nearly as practicable, contain equal numbers of people. 376 U.S. at 7-8; see also *Karcher v. Daggett*, 462 U.S. 725, 730-731 (1983). *Wesberry* did not address the antecedent question of how many Representatives should be allocated to the State (and therefore how many congressional districts it should have) in the first place.

Furthermore, the decision in *Wesberry* rests on *Clause 1* of Article I, Section 2, which provides that Representatives shall be chosen "by the People of the several States." See 376 U.S. at 7-8; *Reynolds v. Sims*, 377 U.S. at 559, 560. That Clause had previously been construed to afford a personal right to vote in federal elections. See *Wesberry*, 376 U.S. at 17 (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884), and *United States v. Classic*, 313 U.S. 299 (1941), both of which rested on Clause 1 of Article I, Section 2 (see 110 U.S. at 663; 313 U.S. at 314)). *Wesberry* essentially extrapolated from those decisions to hold that a State may not dilute the right to vote by drawing congressional districts that have substantially unequal populations. 376 U.S. at 17-18. That holding has no application in this case, which involves neither a

State's regulation of the election of its Representatives nor the drawing of congressional districts within a State. Indeed, the limits of *Wesberry* are established by Clause 1 itself, which concerns the election of Representatives "by the People of the *several* States"—i.e., by the distinct body of people within each of the separate sovereign States that comprise the Union.<sup>39</sup> The quoted text does not speak to the distinct issue of apportioning to the States the Representatives who, in turn, will be elected by the people thereof. That subject is instead dealt with by Clause 3 of Article I, Section 2.

Unlike Clause 1, Clause 3 does not mention the "People" of the several States—and therefore does not suggest that it confers on the "People" of a State any personal rights with respect to the apportionment of Representatives by Congress. Rather, Clause 3 provides for apportionment of Representatives to the States themselves, based on their aggregate populations ("respective Numbers").<sup>40</sup> There accordingly is no textual basis for the district court's holding that the Constitution *requires* Congress to apportion Representatives in a way that minimizes the absolute difference between the average size of congressional districts within "the several States."

Moreover, unlike drawing congressional districts within a State, for which near perfect equality of representation for equal numbers of people is practicably attainable (see,

<sup>39</sup> The definition of the word "several" when the Constitution was adopted was "a state of separation; or partition." See 2 S. Johnson, *A Dictionary of the English Language* (1755) (Hildesheim facsimile ed. 1968):

<sup>40</sup> See note 31, *supra* (quoting S. Doc. No. 119, *supra*, at 8 (statement of Senator Webster)); 3 Annals of Cong. 545 (1792) (Rep. Giles) ("representation of the people through the medium of the several States"); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-552 (1985); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546-547, 549-552, 558-560 (1954).



e.g., *Karcher v. Daggett*, *supra*), apportionment of Representatives among the States under *any* available method would almost inevitably result in differences of several hundred thousand in the population of congressional districts. 2 J.A. 69-70. Because such differences are inherent in the exercise by Congress of its plenary power to implement Clause 3 and the Fourteenth Amendment, variations in the amounts of those differences under various apportionment formulae do not violate the Constitution, so long as the variations are the consequences of apportionments that are rationally tied to the "respective Numbers" of the States.

2. In any event, 2 U.S.C. 2a is constitutional even if we assume, *arguendo*, that the principles of *Wesberry* are applicable. In the first place, equality of representation—and the principle of one person/one vote—may be expressed either in terms of persons per Representative or Representatives per person (each person's share of a Representative), and "there is no inherent reason for the choice of one rather than the other." Chafee, 42 Harv. L. Rev. at 1031. It follows that there is no basis in the principles of *Wesberry* for preferring the harmonic means method that the district court and appellees endorse.<sup>41</sup> For although harmonic means is superior to the other four methods in minimizing absolute differences between persons per Representative, it actually is *inferior* to equal proportions in minimizing absolute differences between each person's share of a Representative. Conversely, although major fractions is superior to the other four methods in minimizing absolute differences between each person's share of a Representative, it is inferior to equal proportions in minimizing absolute differences

<sup>41</sup> "Indeed, [per capita representation] is perhaps the most natural one to consider when interpreting the Supreme Court's dictum that 'as nearly as is practicable one man's vote in a Congressional election is to be worth as much as another's.'" *Fair Representation* at 53 (quoting *Wesberry*, 376 U.S. at 7-8).

between persons per Representative. 1948 Report (App., *infra*, 8a-9a); *Fair Representation* at 53. Thus, equal proportions occupies a middle ground between harmonic means and major fractions with respect to both *absolute* measures of equity, while being superior to harmonic means and major fractions with respect to both *relative* measures of equity.

Even if the district court were correct, however, that absolute differences in statewide average district sizes should control, the exacting standards of *Karcher* obviously could have no place here. Indeed, in view of the disparities that would unavoidably result even under the harmonic means method, the modestly greater absolute disparity under the equal proportions method is of far less significance here than it might be in another context. For example, under the equal proportions method, the difference between the largest statewide average district size (803,655 for Montana) and the smallest (455,975 for Wyoming) is 347,680, while under the harmonic means method, the difference between the largest (699,999 for South Dakota) and smallest (401,828 for Montana) is 298,171. 2 J.A. 69-70. In the special context of apportionment among States, this reduction of 49,509 (from 347,680 to 298,171) in the difference between the smallest and largest average districts that would result from using the harmonic means method—an amount that constitutes less than 8.7% of the nationwide average district size of 572,466 (1 J.A. 27)—is insufficient to trigger further scrutiny under *Wesberry* principles. Cf. *Brown v. Thompson*, 462 U.S. 835, 842 (1983) (10% rule for apportionment of state legislative districts).<sup>42</sup> But even if the

<sup>42</sup> That is especially so since under the equal proportions method, the smallest statewide average district size is for the single district in Wyoming, which has only 455,595 people. 2 J.A. 70. That district results from the threshold constitutional requirement that each State have at least one Representative, not from the selection of the equal proportions method for apportioning additional Representatives to other States. If we therefore put Wyoming's single district

8.8% deviation were sufficient to shift the burden of justification to the appellants, see *Karcher*, 462 U.S. at 740, that burden is amply satisfied here by Congress's considered judgment that the equal proportions method best protects the relative equities of the large and small States.

## II. THE CONSTITUTION DOES NOT REQUIRE THAT CONGRESS ENACT A NEW APPORTIONMENT AFTER EACH CENSUS

The district court plainly erred in holding that Congress did not make a "good faith effort" to accomplish an appropriate apportionment because reapportionment under 2 U.S.C. 2a occurs on the basis of calculations by Executive Branch officials in accordance with the statutory formula in 2 U.S.C. 2a. See J.S. App. 18a-19a. As Judge O'Scannlain observed, there is "no hint" in Article I, Section 2 that "Congress must reexamine every ten years the formula it uses to address the fractional interest problem," J.S. App. 32a-33a, and that Congress therefore is precluded from invoking its usual authority to delegate such a matter to the Executive Branch under statutory standards. See, e.g., *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-220 (1989). Moreover, at the time the Fourteenth Amendment was adopted, apportionment was governed by the Census Act of 1850, which contained a similar self-executing mechanism, and the adoption of the Fourteenth Amendment therefore should be regarded as a ratification of Congress's authority to take that approach. See pages 7-8, 39, *supra*.

to one side, the next smallest statewide average district size under the equal proportions method is 502,992, for Rhode Island's two districts. The difference between that figure and the largest average district size under the equal proportions method (803,655 for Montana's single district) is 300,663. 2 J.A. 69-70. That difference is virtually identical to the difference of 298,171 between the largest and smallest statewide average district sizes under the harmonic means method.

The existence of the fixed apportionment formula in 2 U.S.C. 2a serves to eliminate the sort of bitter controversy and self-interested apportionment proposals that inevitably resulted prior to 1941, when Congress enacted an apportionment on an ad hoc basis only after the results of the most recent decennial census were already known. Such a controversy effectively prevented *any* reapportionment after the 1921 census. Thus, 2 U.S.C. 2a produces stability and promotes public confidence that representation in the House is determined in a fair and neutral manner and that the perceived advantages and disadvantages to particular States following any one census will, in the long run, even out. Congress reasonably could agree with Justice Story that "the rule [of apportionment] ought to be such, that it shall always work the same way in regard to all the states, and be as little open to cavil, or controversy, or abuse, as possible." 2 J. Story, *Commentaries on the Constitution* § 676 (1833) (quoted at J.S. App. 26a (O'Scannlain, J., dissenting)).<sup>43</sup>

<sup>43</sup> The appellee Members of Congress alleged below that 2 U.S.C. 2a is unconstitutional for the additional reason that its self-executing feature deprived them of the right to vote on an apportionment act after the 1990 census. The court held that the congressional appellees have standing to press that claim (J.S. App. 5a), but did not resolve the claim on the merits because it held 2 U.S.C. 2a unconstitutional for other reasons. J.S. App. 18a n.9, 19a. Judge O'Scannlain agreed that the congressional appellees have standing to raise this claim, but he believed that it presents a nonjusticiable political question because it concerns the internal processes of Congress. *Id.* at 20a & n.1.

We disagree with the district court that Members of Congress have standing to present such a claim concerning deprivation of their right to vote in circumstances such as these; the Members retain their right to attempt to persuade the House or Senate to enact a *new* apportionment law, and any injury they suffer with respect to their right to vote is properly attributable to the failure by the House or Senate to take up the matter, not to the existence of the current apportionment law. (A similar standing issue was raised but not decided in *Burke v. Barnes*, 479 U.S. 361, 362-363



**CONCLUSION**

The judgment of the district court should be reversed, and the case should be remanded with directions to enter judgment for the appellants.

Respectfully submitted.

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(1987)), and our briefs in that case address the matter of congressional standing more fully.) There is no occasion for this Court to address the standing issue, however, because the appellee Members of Congress do not rely in the Motion to Affirm on this distinct claim as an alternative ground for affirmance.

**APPENDIX****CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

1. Article I, Section 2, Clauses 1, 2 and 3 of the United States Constitution provide:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Mary-

(1a)

land six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

2. Article I, Section 8, Clause 18 of the United States Constitution provides:

SECTION 8. The Congress shall have Power

\* \* \* \* \*

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. Sections 2 and 5 of the Fourteenth Amendment to the United States Constitution provide:

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

\* \* \* \* \*

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. 2 U.S.C. 2a provides:

**Reapportionment of Representatives; time and manner; existing decennial census figures as basis; statement by President; duty of clerk**

(a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.

(b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.



(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

5. 13 U.S.C. 141 (a) and (b) provide:

**Population and other census information**

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures

and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

(b) The tabulation of total population by States under subsection (a) of this section as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

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REPORT to the PRESIDENT of the  
NATIONAL ACADEMY OF SCIENCES [\*]

The Committee appointed by you, in response to the concurrent resolution of the House of Representatives and the Senate

"That the National Academy of Sciences be requested to transmit to the Speaker of the House and President pro tempore of the Senate a report upon developments in the mathematical aspects of the apportionment problem as it affects the Congress of the United States since its previous report in 1929 and upon the papers and studies relating to that problem"

submits the following report.

An extensive historical and critical review of the problem up to 1941 was prepared for the Brookings Institution by Laurence F. Schmeckebier (1) and published by the Institution. This report contains an analysis of the methods proposed to that date and refers to various papers concerning it.

As far as the committee knows, the only paper since then containing a proposal to be considered was prepared by Professor Walter F. Willcox (2) of Cornell University for the meeting of the International Statistical Institute, September 6-18, 1947, in Washington, D.C. Professor Willcox is the author of the Method of Major Fractions which was used for reapportionment based upon the census of 1930. In his recent paper he proposed what he calls the Modern House method and states that in fact it is the Method of Smallest Divisors, described and analyzed in the Brookings report, and which was considered by the Academy Committee in 1929. Later in its report the present committee will comment upon Professor Willcox's proposal.

The Constitution provides that "Representation shall be apportioned among the several states according to their

[\* Tables omitted]

respective numbers, counting whole numbers of persons in each state, excluding Indians not taxed." . . . "But each state shall have at least one representative."

In order to carry out this provision one divides the total population by the number of representatives and obtains the number of persons a member of the House would normally represent. For the 1940 Census with 435 members of the House this number is 301,164. If, as in the case of Nevada, Wyoming, and Delaware, the population of a state is smaller than this number, each such state is assigned one representative. Then the population of each state is divided by this number to obtain its number of representatives. The result in each case is a whole number and a fraction. Since fractional representation has not been so far introduced, this means that the difference between the fixed membership of the House and the sum of the whole numbers obtained by the above divisions leaves a number of seats to be assigned, if in fact the membership of the House is fixed and not reduced to the sum of the whole numbers obtained.

The problem of handling these fractions has concerned the Congress from the beginning of the republic: a description of the methods used and an analysis of them are given in the Brookings report. The report states that there are the following five workable methods which have been proposed:

- Method of Smallest Divisors (SD)
- Method of the Harmonic Mean (HM)
- Method of Equal Proportions (EP)
- Method of Major Fractions (MF)
- Method of Greatest Divisors (GD)

It is our understanding that Public Law 291 (H.R. 2665) directs that all future apportionments of representatives in the Congress shall be made by the method EP. We shall accordingly give special attention to this method. For reference to E. V. Huntington who first proposed the method EP, see the Brookings report.



For each of the five methods a mathematical formulation exists derived from the hypothesis on which the method is based. A procedure for calculating the allotment by each method has been developed and is described in the Brookings report. When an allotment has been worked out in accordance with these procedures the question arises whether the allotment is equitable between each pair of states.

It has been mathematically demonstrated (see Brookings report, p. 69) that the five methods listed above, in comparison of states by pairs, favor the smaller states, in the order listed, starting with the most favorable, namely SD. A change of method from EP to SD would favor the small states considerably. To make this clear the number of representatives assigned to the respective states under the above five methods has been given in two tables, one for the 1930 and one for the 1940 census.

To compare the allotment of representatives under different methods still further, let  $A$  be the population of a given state and  $a$  the number of representatives assigned

this state. The ratio  $\frac{A}{a}$  is called the district population

of the state or more accurately the *state-averaged district population*. The ratio  $\frac{A[*]}{a}$  is the *share in a repre-*

*sentative* which each individual in the state has. In these terms four different criteria of fairness in a comparison between two states have been distinguished. According to these standards one should leave the allotment of representatives to states A and B unchanged, or take a representative from A and give it to B, or take a representative from B and give it to A, so as to minimize one of the following differences:

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[\* Apparently should be  $\frac{a}{A}$ ]

- (1) The difference between the two state-averaged district populations (Minimum achieved by HM)
- (2) The difference between the share in a representative for the two states (Minimum achieved by MF)
- (3) The difference in (1) taken as a per cent. of the smaller district population (Minimum achieved by EP)
- (4) The difference in (2) taken as a per cent. of the smaller share in a representative (Minimum achieved by EP)

A method such as EP will be said to be *superior* to a method such as MF by test (1) if for every pair of states and for any conceivable district populations the difference (1) is never smaller when the method EP is used than when MF is used. Since the comparison of different pairs of states may yield different results, a test, such as (1), may not show either EP or SD to be superior to the other. Superiority by tests (2), (3), and (4) is similarly defined. With this understood, one can compare EP with each of the other four methods as follows:

Comparing EP with MF, EP is superior by tests (1), (3), (4), and inferior by (2).

Comparing EP with SD, EP is superior by tests (2), (3), (4), and there is no general rule for test (1).

Comparing EP with HM, EP is superior by tests (2), (3), (4), and inferior by (1).

Comparing EP with GD, EP is superior by tests (1), (3), (4), and there is no general rule for (2).

Thus in the above four comparisons EP scores decisively in each case. Those comparisons which are here made for the first time have been established algebraically by a member of the committee.

*Concerning Professor Willcox's proposals.* This report would not be a reply to the request of the National Academy if it did not analyze the recent paper of Professor Willcox. Professor Willcox has suggested that there are other methods of comparison than the five methods pre-

viously discussed. The committee has studied even broader classes of methods in which the divisors are between the extreme divisors of GD and SD, and the conclusions of the committee as stated above should be understood as made on this basis.

Professor Willcox states, "If Congress wishes to give the largest possible number of seats to populous states it should use one extreme method" GD; on the contrary the committee has found that it is possible to formulate a method for a fixed membership in the House in which the divisors are between the extreme divisors of GD and SD, which is as favorable to the populous states as GD, and in certain cases more favorable.

Professor Willcox states further, "If Congress wants to get the closest possible approach to equality in the district population of the 48 states it should use the other extreme method" SD. This is contradicted by earlier results in this report proved in the Brookings report, that EP is superior to SD under test (3), and HM superior to SD under test (1).

Professor Willcox raises the question of minimum range, meaning thereby the difference between the largest and smallest state-averaged district populations of the whole 48 states. He implies that in the case of the 1940 census SD gives a smaller minimum range than does EP. On page 14 he finds this range when the method of EP is used and when the method of SD, using only the states in which the two methods actually produce differences and in addition Nevada. It seems more reasonable, however, to make the comparison using all the states which are *really in competition* for representatives excluding states such as Nevada which receive one representative by law, but which by no proposed method have a chance of receiving a second. Nevertheless Willcox includes Nevada. If Nevada is excluded from his list the range, using EP, is slightly less than that using SD. Apart from this criticism of Willcox's table the committee does not feel that a comparison of the range of state-averaged district popu-

ations resulting from a use of the different methods under discussion will show any trend which is significant with the considerable differences in equity when states are compared in pairs.

Tables are included in this report which give the state-averaged district populations under the 1930 and 1940 census. These tables show that if Nevada is omitted EP yields a smaller range than SD in 1940 and a larger range in 1930. A closer examination of the tables will reveal that such a test depends upon the relatively erratic behavior of the populations of a few small states, and there is small probability that it will be influenced by the population of the large states in which the great majority of the people live. To use the language of gunfire, the test of minimum range makes the evaluation of a method depend upon a few eccentric shots, and in this sense is a random determination of value.

*Summary.* The committee is unaware of any new method which has been explicitly developed in workable detail since 1920 which goes beyond the five methods discussed above. This report points out that the claim of Willcox that the method of SD minimizes the discrepancy between state-averaged district populations is not valid in general. An over-all comparison of EP and SD by means of range of state-averaged district populations is not believed likely to reveal a significant trend, compared with the clear differences in equity of the five methods when states are compared in pairs. The accompanying tables illustrate the way in which SD favors the small states.

As compared with all other methods, the present legal method EP is the best for minimizing the per cent. discrepancy in the state-averaged district populations and the individual's share in a representative. Comparing EP with each of the other four methods by the criteria (1), (2), (3), (4), the total score in favor of EP against the four other methods is decisive. The method of EP stands in a middle position as compared with the other methods.



It is for Congress to decide which of the above comparisons are significant, which most nearly meets the requirements of the Constitution, and choose accordingly.

/s/ Marston Morse

/s/ John von Neumann

/s/ Luther P. Eisenhart, Chairman

Princeton, New Jersey, May 28, 1948.

# REFERENCES

- (1) "Congressional Apportionment", The Brookings Institution, Washington, D.C., 1941.
- (2) "Methods of Apportioning Seats in the House of Representatives among the States", distributed by the Joint Arrangements Committee for the International Statistical Conferences, Aug. 20, 1947.